# STATE OF MICHIGAN

# COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN WILLIAMS,

Defendant-Appellant.

---

UNPUBLISHED
July 17, 2003

No. 239301
Wayne Circuit Court
LC No. 00-012172-01

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316. Following a jury trial, he was convicted of second-degree murder, MCL 750.317, and was sentenced to a prison term of thirty to sixty years. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in determining that the prosecution exercised due diligence in finding a witness, the victim's girlfriend, and that it improperly admitted that witness' preliminary examination testimony. We review a trial court's determination that the prosecution exercised due diligence in attempting to locate a witness for trial for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

An accused has a constitutional right to be confronted with the witnesses against him. *People v Dye*, 431 Mich 58, 64; 427 NW2d 501 (1988). However, "the constitutional right to confront one's accusers would not be violated by the use of preliminary examination testimony as substantive evidence at trial only if the prosecution had exercised both due diligence to produce the absent witness and that testimony bore satisfactory indicia of reliability." *Bean, supra* at 682-683. MCL 768.26 sets out the general rule that the prosecution may use preliminary examination testimony whenever the witness giving such testimony cannot, for any reason, be produced at trial.

> The prosecution may present at trial the transcribed testimony of a witness at the preliminary examination, MRE 804(b)(1), if the witness is unavailable in the sense explained in MRE 804(a)(5):
>
> "Unavailability as a witness" includes situations in which the declarant is absent from the hearing and proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, *and in a*

*criminal case, due diligence is shown.* [*Bean, supra* at 683-684 (emphasis added).]

The test for whether a witness is "unavailable" as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Bean, supra* at 684. This Court has held that "due diligence requires that everything reasonable, not everything possible, be done." *People v Whetstone*, 119 Mich App 546, 552; 326 NW2d 552 (1982).

Here, the record reveals that the prosecution exercised due diligence in its attempts to produce the witness. After an unsuccessful attempt to personally serve the witness one week before trial, the police contacted various area agencies, including local morgues, hospitals, jails, utilities, postal service, and the Family Independence Agency. The police also contacted the victim's family, but the only relatives of the witness that they were aware of lived in Indiana. The prosecution is "not required to exhaust all avenues for locating [a witness], but ha[s] a duty only to exercise a reasonable, good-faith effort in locating him." *People v Briseno*, 211 Mich App 11, 16; 535 NW2d 559 (1995). Based on the facts and circumstances of this case, the trial court's determination that the prosecution exercised due diligence in attempting to produce the witness cannot be said to rise to the level of an abuse of discretion. Therefore, the trial court's admission of the witness' preliminary examination testimony, at which time defendant had an opportunity to and did cross-examine the witness, was not error.

Defendant next argues that the trial court erred by failing to instruct the jury on the lesser included cognate offenses of assault with intent to do great bodily harm less than murder and aggravated assault. A requested instruction on a necessarily included lesser offense – whether a felony or a misdemeanor – is proper if the charged greater offense requires the jury to find a disputed factual element which is not part of the lesser included offense and a rational view of the evidence would support it. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). However, an instruction on a cognate lesser included offense is not permissible. *Reese, supra* at 446; *Cornell, supra* at 359; *People v Alter*, 255 Mich App 194, 200-201; 659 NW2d 667 (2003). A cognate lesser included offense shares several elements and is in the same class of offenses as the greater crime, but differs from the greater crime in that it contains some elements not found in the higher offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001).

Defense counsel requested instructions on assault with intent to do great bodily harm less than murder and aggravated assault. Assault with intent to do great bodily harm less than murder is a cognate lesser included offense of second-degree murder. *People v Bailey*, 451 Mich 657, 668; 549 NW2d 325 (1996). That is, because the greater offense of second-degree murder can be committed without committing assault with intent to do great bodily harm less than murder, and both crimes are serious offenses against the person, the lesser offense is classified as cognate. *Id*., 668-669; see also *People v Williams*, 143 Mich App 574, 579-581; 374 NW2d 158 (1985). It logically follows that assault with intent to do great bodily harm less than murder is also a cognate lesser included offense of first-degree murder, because first-degree murder shares the same elements of second-degree murder, with the additional element of premeditation. *People v Carter*, 395 Mich 434, 438; 236 NW2d 500 (1975). Similarly, aggravated assault is

properly characterized as a cognate lesser included misdemeanor offense of first-degree murder, because the greater offense of first-degree murder can be committed without committing aggravated assault, and both crimes are serious offenses against the person. *Jones, supra* at 401; *Williams, supra at* 579-581.[1]

The trial court properly refused to give the requested instructions on the cognate lesser included offenses of assault with intent to do great bodily harm less than murder and aggravated assault. *Cornell, supra* at 356-358. The decision in *Cornell* was given limited retroactive effect, applicable to those cases pending on appeal in which the issue has been raised and preserved. *Id*. at 67. Because this case was pending on appeal at the time *Cornell* was decided, and because the issue was preserved at trial and raised on appeal, the *Cornell* holding controls. *Reese*, *supra* at 446.

Defendant next argues that the prosecutor engaged in prosecutorial misconduct when he improperly vouched for the credibility of his witnesses. Defense counsel failed to object to the alleged instance of prosecutorial misconduct. Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review defendant's claim for plain error. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error must be plain (i.e., clear or obvious), and 3) defendant must show prejudice or that the error was outcome determinative. *Id.* at 763.

It is well settled that a "prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witnesses' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Here, the prosecutor's allegedly improper comments did not suggest that the government had some special knowledge that the witnesses were testifying truthfully. Rather, the prosecutor simply noted that the witnesses did not have a reason to lie, and that they testified as best they could regarding their recollection of the incident. Because the prosecutor's comments did not constitute improper vouching, we find that no prejudicial misconduct occurred.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White

[1] In the lead opinion of *Williams, supra*, Judge Borman, sitting by assignment, stated that the defendant's requested assault instructions on the crime of first-degree murder were to be construed as cognate lesser included offenses. Judge Shepard concurred, but did not disagree with Judge Borman's conclusion that the assault offenses for which the defendant sought instructions were cognate lesser included offenses. *Id*. at 589-592. Judge Cynar concurred, and also did not disagree with the characterization of assault offenses as cognate lesser included offenses. *Id*. at 592. Moreover, this Court's decision in *Williams, supra*, provides authority for the proposition that aggravated assault is properly characterized as a cognate lesser included misdemeanor offense of first-degree murder.